

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

RAHCO INTERNATIONAL, INC., a) No. CV-06-0216-AAM
Washington Corporation)
Plaintiff,)
LAIRD ELECTRIC, INC., a foreign) ORDER GRANTING
corporation,) DEFENDANT'S MOTION TO
Defendant.) DISMISS

BEFORE THE COURT is Defendant Laird Electric Inc.'s Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(2) (Ct. Rec. 8) filed on September 1, 2006. On October 12, 2006, the Court heard oral argument. John Guin appeared on behalf of Plaintiff and Leslie Weatherhead appeared on behalf of Defendant.

I. BACKGROUND

The Plaintiff, RAHCO International, Inc. (RAHCO) is a Spokane, Washington corporation engaged in the manufacturing of industrial equipment. In June 2005, RAHCO finalized and signed a contract with Suncor Energy, Inc (Suncor), to design, manufacture, deliver to site, and assemble a mobile conveyor system consisting of three large pieces of industrial equipment for use at Suncor's mine site near Fort McMurray, Alberta, Canada. Defendant Laird Electric, Inc. (Laird), is a Canadian corporation and performed work on the Suncor

1 mining project for RAHCO. At the time RAHCO signed the contract
2 with Suncor, RAHCO had already commenced the design and manufacture
3 of the equipment, under a letter of intent from Suncor dated
4 December 16, 2004.

5 The subcontract between Laird and RAHCO came about as follows.
6 On or about mid-June 2005, David Stralka, RAHCO's product support
7 manager, contacted Ron Wilson at Laird and requested a price quote
8 from Laird to supply the labor and equipment necessary for the
9 electrical portion of the work needed to assemble the mobile
10 conveyor system at the Suncor mine site. RAHCO provided Laird with
11 a written "master cable list" prepared for the Suncor project to
12 assist Laird in preparing a price quote. On June 30, 2005, Laird
13 emailed RAHCO a budget proposal of \$466,870.00 (Canadian) plus rate
14 sheets for the work ("Budget Letter"). See Stralka Affidavit, Ct.
15 Rec. 13, Ex. B.

16 After receiving the bid, Stralka sent an email back to Wilson
17 indicating "[w]e have reviewed your proposal and feel we can work
18 together on this project. We'll be in Ft. McMurray [SIC] on 19
19 July 2005 and would like to sit down with you [SIC] go over the
20 details and sign an agreement. Does the 19th of July work for you?"
21 Stralka Affidavit, Ct. Rec. 13, Ex. C. Stralka and Wilson
22 exchanged emails indicating they would meet on July 19, 2005 in
23 Fort McMurray to further discuss the matter.

24 In July, RAHCO and Laird executives met in Fort McMurray. It
25 is undisputed that at that meeting Stralka provided Laird some
26 drawings ("layout drawings"). The parties dispute what was said at
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1 the meeting regarding future course of action. RAHCO claims it
2 informed Laird the work would be done under a fixed-price contract.
3 Stralka Affidavit, Ct. Rec. 13 at ¶ 5. Laird denies this and
4 claims they had agreed approvals which would be made according to
5 "time undertaken, equipment utilized and materials purchased by
6 Laird." Bannerholt Declaration, Ct. Rec. 17 at ¶ 5. Blair
7 Bannerholt, President and Chief Operating Officer for Laird, who
8 was present at the meeting, claims Laird executives were told that
9 while they would be receiving engineered drawings in the future,
10 Laird would not be receiving a narrative scope of work and that on
11 site personnel would be directing their activities. Bannerholt
12 Declaration, Ct. Rec. 17 at ¶ 5.

13 On July 28, 2005, and prior to any work being performed by
14 Laird, RAHCO issued Purchase Order No. 11340 (Stralka Affidavit,
15 Ct. Rec. 13, Ex. D) and several accompanying documents
16 (collectively, the "Purchase Order documents"). It was signed by
17 Cary Ross, a Purchasing Agent for RAHCO. The first page provides
18 a brief description of the work:

19 "[Laird Electric, inc.] to supply labor and equipment for
20 the installation and assembly of the RAHCO supplied
21 equipment to Suncor.
See attachments for Scope of Work, Payment, non-
disclosure agreement, special terms, technical
information and safety.
22 Payment will be based on time and materials using rate
sheets supplied to RAHCO from Laird Electric with a not
23 to exceed price of Canadian dollar in the amount of
\$446,870.00.
Additional work not covered in the Scope of Work may be
24 required. All additional work must be approved, in
writing, by a RAHCO representative prior to commencement
25 of the work."
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1 Stralka Affidavit, Ct. Rec. 13, Ex. D. Following this language, in
2 all capital letters it states:

3 THIS ORDER MUST BE ACCEPTED IN WRITING ON THE ATTACHED
4 ACKNOWLEDGMENT FORM OR BY SEPARATE ACKNOWLEDGMENT

5 *Id.* The second page of the Purchase Order has the heading "Terms
6 and Conditions" and includes the following forum selection clause:

7 DISPUTES: This Agreement will be governed by the laws of the
8 State of Washington. Any dispute relating to this Agreement
9 must be heard before a court of competent jurisdiction in
10 Spokane County, Washington, USA. In any suit, the prevailing
party will be entitled to its reasonable costs, including
attorneys' fees.

11 Stralka Affidavit, Ct. Rec. 13, Ex. D.

12 Stralka hand delivered the Purchase Order documents and other
13 drawings to Laird's office in Ft. McMurray on August 2, 2005. It is
14 undisputed that no one with the authority to execute the Purchase
15 Order documents ever saw them until sometime after October 7, 2006.
16 Laird claims Stralka delivered the documents to a fill-in
17 receptionist for Laird, who forwarded them to Brad Chartrand (See
18 Declaration of Sheree Cameron, Ct. Rec. 19), who in turn forwarded
19 them to Rick Baker in the accounting department (see Declaration of
20 Brad Chartrand, Ct. Rec. 20). Baker apparently filed the Purchase
21 Order believing it was to be used for reference when billing RAHCO.
22 Baker had no authority to execute the Purchase Order and had no
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1 involvement in the preparation of the Budget Letter sent earlier.¹
2 Bannerholt Declaration, Ct. Rec. 17 at ¶ 11.

3 Coincidentally, on the same day Stralka delivered the Purchase
4 Order documents, August 2, 2005, Gary Crummey, Project Manager for
5 Laird, spent 10 hours for what he later billed to RAHCO as "Review
6 of Contract documents." Stralka Affidavit, Ct. Rec. 13, Ex. F.
7 Crummey's time sheets evidence that in the following days he billed
8 over 50 hours for time spent reviewing "contract documents", taking
9 a site tour, discussing the schedule with Stralka, and developing
10 a "3-week plan," a "Q/A² labour plan" and a "Q/A schedule."
11 Stralka Affidavit, Ct. Rec. 13, Ex. F.

12 RAHCO never obtained a signed copy of the Purchase Order
13 documents from Laird or a written acknowledgment form, as was
14 required according to the Purchase Order. On August 21, 2005,
15 however, Laird sent a letter to RAHCO indicating it was ready to
16 commence work on August 30. Stralka Affidavit, Ct. Rec. 13, Ex. G.
17 On August 31, 2005, Laird submitted its first invoice to RAHCO.
18 The invoice, and all subsequent invoices, reference Purchase Order
19 No. 11340, as was required by the terms of the Purchase Order
20 documents. Stralka Affidavit, Ct. Rec. 13, Ex. F, I.

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23 ¹ At the hearing, counsel for RAHCO submitted a printed copy
24 of a page of Laird's website which listed Rick Baker under the
25 heading "Management" and his position as Controller. This
26 evidence does not undermine or controvert the sworn statement of
Blair Bannerholt regarding Baker's authority with respect to the
Purchase Order documents.

27 ² "Quality Assurance."

1 Laird claims to have not even been aware of the Purchase Order
2 documents until October 7, 2005, well after its performance of the
3 work had begun.³ See Crummey Declaration, Ct. Rec. 18 at ¶ 9.
4 Laird claims the reason the invoices reference the Purchase Order
5 is because the accounting department used it, though it had been
6 improperly routed there without prior review or approval by the
7 proper Laird executives. Bannerholt Declaration, Ct. Rec. 17 ¶
8 11(d). Crummey claims that the hours he billed earlier for
9 "contract review" were for time spent reviewing Laird's own Budget
10 Letter and the preliminary drawings provided to Laird at the July
11 meeting. Although the Purchase Order specifically requires the
12 development of a "Q/A plan" (see Stralka Affidavit Ex. D, Scope of
13 Work, §I(2)(e),(f)), Crummey claims Laird's internal management
14 policies require that every project have a QA/QC policy; that
15 Suncor projects always require a Q/A schedule; and that it is good
16 practice for a Project Manager to ensure such a schedule exists.
17 Crummey Declaration, Ct. Rec. 18 at ¶6.

18 In September, Laird began to submit "Requests for Information"
19 for clarifications or changes of the scope of the work and payment
20 terms. See examples at Stralka Affidavit, Ct. Rec. 13, Ex. H. Many
21 requests specifically complain that certain demands were "not part
22 of scope of work." *Id.* Laird claims that it proceeded in this

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24 ³ The Court notes the letter from Crummey mailed on August
25 21, 2005 also states: "Please verify the arrival of Jorge Ascuy,
26 Technician for the execution of the main contract." *Id.* It is
27 not clear from the record what the "main contract" refers to. As
the parties did not point to this statement in any of their
arguments, the Court assumes it cannot be construed as a
reference to the Purchase Order documents.

1 fashion not because of the terms of the Purchase Order, but because
2 it was the established mechanism that Laird used on all of its
3 other work performed on other Suncor projects. Bannerholt
4 Declaration, Ct. Rec. 17 at ¶ 9.

5 Subsequently, a dispute arose between RAHCO and Laird
6 concerning the work performed by Laird and RAHCO's duty to pay.
7 Dowler Declaration, Ct. Rec. 9 at ¶ 17. Apparently that dispute
8 has been submitted to the Canadian courts for adjudication. *Id.*
9 In addition, Laird has commenced proceedings against Suncor and
10 RAHCO in the Canadian courts seeking payment. *Id.*

11 A complaint was filed by RAHCO against Laird in Spokane
12 Superior Court on June 15, 2006 alleging breach of contract. Laird
13 removed the action to federal court and moved for dismissal
14 pursuant to Federal Rule of Civil Procedure 12(b)(2). Laird
15 contends that since the Purchase Order was never signed, the
16 agreement is invalid, and RAHCO's assertion of personal
17 jurisdiction based upon its forum selection clause must fail. In
18 opposition, RAHCO argues Laird's continued performance constituted
19 an acceptance of the terms of the unsigned Purchase Order
20 documents, including the forum selection clause, and thus the
21 Purchase Order was a valid, binding agreement and its Complaint
22 should not be dismissed.

23 **II. DISCUSSION**

24 **A. FRCP 12(b)(2)**

25 Although the plaintiff ultimately has the burden to prove that
26 the defendant is subject to personal jurisdiction, when a motion to
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1 dismiss is evaluated without an evidentiary hearing (as in this
2 case), the plaintiff need only make a prima facie showing to
3 survive dismissal pursuant to FRCP 12(b)(2). *Farmers Ins. Exch. v.*
4 *Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911, 912 (9th Cir.
5 1990); *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements*
6 *Ltd.*, 328 F.3d 1122, 1128-29 (9th Cir. 2003)). To establish a prima
7 facie showing of personal jurisdiction, plaintiff must provide
8 evidence, that if believed, would support the court's exercise of
9 jurisdiction over the defendant. *Ballard v. Savage*, 65 F.3d 1495,
10 1498 (9th Cir. 1995). The court need not accept the plaintiff's
11 bare allegations if the defendant controverts them with evidence.
12 See *AT & T Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588
13 (9th Cir. 1996). If both parties provide evidence supporting
14 different versions of a fact, however, the court must resolve
15 competing inferences in the plaintiff's favor. *Harris Rutsky*, 328
16 F.3d at 1129.

17 Once the prima facie case is established, the burden shifts to
18 the defendant to establish that jurisdiction is unreasonable.
19 *Burger King v. Rudkewicz*, 471 U.S. 462, 477-78, 105 S.Ct. 2174, 85
20 L.Ed.2d 528 (1985). A defendant may not simply contest the factual
21 allegations made by the plaintiff, but instead must demonstrate
22 additional considerations which undermine the court's personal
23 jurisdiction over the defendant to overcome the plaintiff's prima
24 facie showing. *Id.* at 476.

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1 **B. Application**

2 Ordinarily the starting point of an analysis of personal
3 jurisdiction involving an out-of-state defendant is the familiar
4 due process "minimum contacts" inquiry. *Tuazon v. R.J. Reynolds*
5 *Tobacco Co.*, 433 F.3d 1163, 1168-69 (9th Cir. 2006)(citing
6 *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).
7 However, parties may consent to the jurisdiction of a particular
8 court through the use of a forum-selection clause in a contract,
9 regardless of minimum contacts. See *Burger King Corp.*, 471 U.S. at
10 473, n. 14("[B]ecause the personal jurisdiction requirement is a
11 waivable right, there are a variety of legal arrangements by which
12 a litigant may give express or implied consent to the personal
13 jurisdiction of the court"). Where a forum selection provision has
14 been obtained through a "freely negotiated" agreement and is not
15 "unreasonable and unjust," *The Bremen v. Zapata Off-Shore Co.*, 407
16 U.S. 1, 15 (1972), its enforcement does not offend due process.
17 *Burger King Corp.*, 471 U.S. at 473, n. 14.

18 In this case, RAHCO does not contest Laird's contention that
19 Laird's contacts with Washington are insufficient to confer
20 jurisdiction. Consequently, jurisdiction in this case rests solely
21 on the application of the forum selection clause contained in
22 RAHCO's Purchase Order documents. The Court, however, need not
23 decide the broader question of whether the contract between RAHCO
24 and Laird includes the Purchase Order Terms and Conditions. The
25 precise terms of the parties' agreement is a question for another
26 day. Regardless, the forum selection clause in this case is

1 unenforceable because it is has not been obtained through a freely
2 negotiated agreement.

3 As evidenced by the defendants' affidavits, which are not
4 challenged by plaintiff, not only is there no indication that the
5 choice of forum was ever bargained for or discussed, but there is
6 also no indication that any of the Purchase Order documents were
7 the result of negotiation between the parties. Instead, it is
8 RAHCO's contention that Laird gave implied consent to the terms of
9 the Purchase Order through its course of conduct and performance of
10 the work described in the Purchase Order documents. In making this
11 argument, RAHCO admits the absence of negotiation.

12 It is undisputed that the Purchase Order documents were never
13 signed by Laird. Nevertheless, given the law's strong favor toward
14 the enforcement of forum selection clauses, *Mannetti-Farrow, Inc.*
15 v. *Gucci America, Inc.*, 858 F.2d 509, 514 (9th Cir. 1988), this
16 would be a closer case if there was any evidence Laird had assented
17 or otherwise conducted itself according to any of the terms
18 embodied in the Purchase Order documents. See *Roberts & Schaefer*
19 Co. v. *Merit Contracting, Inc.*, 99 F.3d 248 (7th Cir. 1996)(holding
20 forum selection clause contained in unsigned Purchase Order would
21 be enforced where subcontractor had negotiated terms of Purchase
22 Order and agreed to the same terms in earlier agreement covering
23 another project).⁴ But Laird has come forward with undisputed

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25 ⁴ The Court received the parties' post-hearing letters
26 regarding the case of *Comerica Bank v. Whitehall Specialties*, 352
27 F.Supp.2d 1077 (C.D.Cal. 2004). As was the case in *Merit*
Contracting, the Court recognizes that in certain circumstances,
courts have enforced forum selection clauses even where they were

1 evidence that the Purchase Order documents were never even seen by
2 the appropriate Laird executives due to an internal mistake.

3 Though RAHCO surmises that Laird reviewed the Purchase Order
4 documents and performed pursuant to its terms, RAHCO has provided
5 no evidence, which even if believed, would prove Laird's conduct
6 related to the terms and conditions set forth in the Purchase Order
7 documents. Laird, on the other hand, has offered evidence which
8 contradicts RAHCO's supposition and suggests that Laird's
9 performance was consistent with the terms of its own Budget Letter
10 and its own operating procedure, rather than the terms of the
11 Purchase Order. Furthermore, RAHCO has not offered any persuasive
12 evidence which would cause the Court to question the veracity of
13 Laird's facts.

14 The designated forum and law can control the cost and outcome
15 of potential litigation, impacting the parties' substantive rights.
16 Therefore, forum selection clauses are typically the product of
17 bargaining upon entering into a contract. This is especially true
18 in contracts involving foreign entities. The enforcement of forum
19 selection clauses must comport with due process. Due process
20 requires that individuals have "fair warning that a particular
21 activity may subject [them] to the jurisdiction of a foreign
22 sovereign," *Burger King Corp.*, 471 U.S. at 472. Drawing all
23 inferences in favor of RAHCO, the Court cannot conclude, based on
24 the particular facts at hand, that Laird Electric, a Canadian
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26 not the product of specific negotiation between the contracting
27 parties.

1 corporation solicited for work in Canada, had fair warning it could
2 be haled into court in Washington. The Court finds it would be
3 necessarily unreasonable to enforce the forum selection clause in
4 this instance.

5 As there is no other basis for obtaining jurisdiction over
6 this foreign defendant, the Court hereby **GRANTS** Defendant's Motion
7 to Dismiss (Ct. Rec. 8). Plaintiff's complaint is **DISMISSED**.

8 **IT IS SO ORDERED.** The District Executive is directed enter
9 this order and furnish copies to counsel, enter judgment in favor
10 of the Defendant, and CLOSE the FILE.

11 **DATED** this 20th day of October, 2006.

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13 _____
14 s/ Alan A. McDonald
15 ALAN A. McDONALD
16 SENIOR UNITED STATES DISTRICT JUDGE
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